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238696—53

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 551

UNITED STATES OF AMERICA, PETITIONER

v.

HAMILTON MARTELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered November 18, 1952.

OPINIONS BELOW

The opinion of the District Court denying defendant's motion for judgment of acquittal or new trial (R. 136–142) is reported at 104 F. Supp. 140. The opinion of the Court of Appeals (R. 150–153) is reported at 199 F. 2d 670.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1952. (R. 153.) On December 16, 1952, Mr. Justice Burton entered an

order extending the time for filing a petition for a writ of certiorari to January 17, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals properly held that the trial court committed prejudicial error in instructing the jury on "willfulness" as an element of the offenses charged.

STATUTES INVOLVED

Internal Revenue Code:

> SEC. 145 (b): *Failure To Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> * * * * *
>
> SEC. 3793 (b): (1) *Assistance in Preparation or Presentation.*—Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or pre-

sentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

28 U. S. C. 2111: *Harmless Error.* On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

STATEMENT

On March 24, 1952, respondent was brought to trial on two indictments returned against him on February 15, 1952. One indictment (R. 4–6), containing four counts, charged that respondent, in violation of Section 145 (b) of the Internal Revenue Code, *supra,* p. 2, had attempted to defeat and evade a large part of his income taxes for the years 1945–1948, inclusive, by causing the filing of fraudulent returns. The other indictment (R. 7–12), containing eight counts, charged that, in violation of the same statute, he had attempted to defeat and evade income taxes owed by his

mother for the years 1945–1948, inclusive, and that, in violation of Section 3793 (b) (1) of the Internal Revenue Code, *supra,* pp. 2–3, he had aided, assisted, and advised the preparation of fraudulent income tax returns of his mother for each of those years.

Respondent's tax evasion scheme, as revealed by the testimony of the Government's witnesses, consisted of preventing the recording of certain sales in the books from which the income tax returns in question were prepared (R. 15–87). Respondent called no witnesses at the trial.

The jury found him guilty on all counts of both indictments. (R. 124–126.)

In the course of the charge, the trial court read to the jury both indictments (R. 95–102), which alleged with respect to each violation that respondent had acted "willfully and knowingly." The court also charged, with respect to the violations of Section 3793 (b) (1), as follows (R. 103):

> We have another section, which is 3793–B. The Congress says there that anyone who procures the same to be falsely or fraudulently executed is guilty of violating that law. That is how clear, that is how simple, that is how direct the law is in this particular case which you will apply to the facts of the case.

At the conclusion of the trial court's charge to the jury, respondent's counsel asked, among other things, that the court instruct the jury

specifically on the necessity of "willfulness" as an ingredient of the crimes. (R. 112.) The jury was recalled and the court charged as follows (R. 122–123):

> I have been asked to charge you with respect to willfulness. Strangely enough, members of the jury, there is no willfulness needed in an income tax case. The burden of proof is for the Government to show that the defendant filed it with a bad purpose. That is what our Supreme Court says about it, a bad purpose, that makes the willfulness. Did the defendant file that income tax return for gain to himself? If he did, that is a bad purpose. That is the degree of willfulness required.[1]

Counsel for respondent objected to this portion of the charge (R. 123). Thereupon, the court said to the jury (R. 123):

> In other words, members of the jury, I will read the precise language that the Supreme Court uses. The Supreme Court says:
>
> "The Government must prove beyond a

[1] The court did not give the following charge requested by respondent (R. 127, 135):

"I charge you that wilfully under this Section of the Internal Revenue Code means knowingly and with a bad heart and a bad intent; it means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent or grossly negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books."

> reasonable doubt the defendant with a bad purpose attempted to evade his tax. The jury can take all the evidence into account to determine the defendant's intent or purpose."
>
> You may have an exception to that.

After the verdict was returned, respondent moved for a judgment of acquittal or for a new trial on the ground, *inter alia,* that the court had committed error in instructing the jury on willfulness as a necessary element of the offenses involved (R. 128–135).

In its opinion denying these motions (R. 136–142), the trial court said (R. 139):

> Defendant further argues that the jury was not properly instructed as to the willfullness required to sustain a conviction under section 145 (b) of the Internal Revenue Code (the "defeat and evade" section); that it was error to deny defendant's sixth point for charge. The Court holds that the jury was adequately instructed on this head. Thus, we charged that the burden was upon the Government to show that the defendant filed the return with a bad purpose; that a bad purpose supplied the necessary element of willfulness. In *United States* v. *Murdock,* 290 U. S. 389 (1933), the Supreme Court of the United States held:
>
> "The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from acciden-

> tal. *But when used in a criminal statute it generally means an act done with a bad purpose* (*Felton* v. *United States,* 96 U. S. 699; *Potter* v. *United States,* 155 U. S. 438; *Spurr* v. *United States,* 174 U. S. 728); without justifiable excuse * * *; stubbornly, obstinately, perversely, * * *."

The Court of Appeals, in an opinion filed November 18, 1952 (R. 150–153), ordered that the judgment of the District Court be reversed and the case remanded for further proceedings. The sole ground stated for this reversal was that the trial court's instructions to the jury on the issue of willfulness constituted error.

REASONS FOR GRANTING THE WRIT

1. The Government concedes that the offenses charged here required willfulness. It is submitted, however, that the jury was adequately apprised as to the intent necessary for conviction by the trial court's instruction that "bad purpose" must be found.

"Willfulness" is not a word of art, having a fixed meaning in every context. It is, this Court has said, a word which takes its color from its statutory environment. *United States* v. *Spies,* 317 U. S. 492. The term, at the very least, connotes conscious and knowing behavior. As used in most criminal statutes, it means, in addition, an act done with a "bad purpose." *United States* v. *Murdock,* 290 U. S. 389.

The "willfulness" necessary for a violation of Section 145 (b) has already been defined by this Court. *United States* v. *Spies,* 317 U. S. 492. Violation of that Section, it was held, requires more than a knowing failure to file returns and to pay taxes. The accused must have acted affirmatively, with "evil motive," to evade the obligation owed the United States. It would appear, therefore, that the trial court's instructions to the jury that, for conviction, respondent must be found to have caused the filing of false returns with a "bad purpose," satisfied the test of "willfulness" as defined by the *Spies* case.

The Court of Appeals held otherwise. It thought that, despite the trial court's reiterated statements as to bad purpose, the jury may have been left with the impression that conviction could be had even though respondent had acted through "inadvertent error." It might be "bad purpose," said the Court of Appeals, to evade taxes in order to gamble, and "good purpose" to do so in order to pay medical expenses. (R. 152.) Thus, it treated the trial court's instructions on the intent necessary to commit the crimes as though they were abstract comments, having no relation to the context of the particular circumstances. The Court of Appeals thereby attributed a significance to the words "bad purpose" that they could not have had for the jury which heard them. For several days the jury had listened to

testimony directed to establishing that respondent had not had certain sales recorded in the books from which the income tax returns in question were prepared. The record contains no testimony about the use that he made of the money he obtained as a result of his crimes, and it is wholly unrealistic to assume, as the Court of Appeals did, that the jury understood the term "bad purpose" as referring to anything other than the intent with which respondent had consciously acted.

Considered as a whole and in context, it is submitted, the trial court's instructions adequately informed the jury as to the intent necessary for violation of the statutes in question and thereby protected every substantial right of the accused.

2. It is apparent from its opinion that the Court of Appeals refused to give proper weight to the instructions as to "bad purpose" because of its concentration on the single sentence of the charge stating that willfulness was not required. Assuming that a single sentence of a charge may be taken from context and labelled error (but see *Boyd* v. *United States,* 271 U. S. 104, 107), the Government submits that any such error here was rendered harmless by the subsequent instructions as to "bad purpose," and should have been so treated by the Court of Appeals.

The proper administration of federal criminal justice requires that large discretion be vested in trial courts—both as to the conduct of proceedings